Internalization of Customary International Law: An Historical Perspective

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> [T]he heroes of the book are what can be loosely called 'methods of composition'. It is as if a painter said: look, here I'm going to show you not the painting of a landscape, but the painting of different ways of painting a certain landscape.
>
> V. Nabokov††

Introduction

Analyzing an area of substantive law from an historical perspective offers the prospect of comprehending deeper structures that might otherwise defy explanation. The unfamiliar quality of the terminology and conceptual posturing characterizing antiquated legal discourse detaches the student from the force of contemporary rhetorical modes and propels him toward the discovery of otherwise obscured structural patterns. Indeed, the very distance in time between student and subject matter tends to demystify the given field of inquiry, allowing it to be understood in terms of some underlying explanation which was unarticulated, and generally unperceived, by actual participants.

The emergence of modern internalization doctrine—the absorption of international customary norms into the domestic sphere—has been marked by attempts to sort out the various distinctions applied by courts in adjudicating international legal claims. At the same time, however, contemporary doctrinal pronouncements have become increasingly inconsistent in their own categorical schemes.[1] For every holding through

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†† V. NABOKOV, THE REAL LIFE OF SEBASTIAN KNIGHT 95 (1941).

1. Thus, for example, despite the frequent insistence by U.S. courts that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction," The Paquete Habana, 175 U.S. 677, 700 (1900), it is also strenuously asserted that when an agency of government "adopts a policy contrary to a trend in international law . . . the courts must accept the latest act of that agency." Tag v. Rogers, 267 F.2d 664, 668 (D.C. Cir. 1959).

which international law establishes a judicially-determinable boundary limiting the exercise of state power,[2] a counterpoint case implies a "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[3] And for every indication that international law binds actions by a "recognized state or one of its officials acting under color of state law,"[4] there are positivist expressions that international legal rules depend upon the prior consent of sovereigns.[5]

This article examines the domestic enforcement, or internalization, of international customary norms. More specifically, it explores the transition from early nineteenth-century jurisprudence, which first examined the scope of the executive's foreign affairs and military powers, through the case law of the classical liberal genre, which appeared a century later, to the contemporary judicial implementation of international human rights norms. To this end, the article will discuss four cases reflecting

2. *See* United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (kidnapping criminal defendant from foreign country); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (torture by state officials).

3. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

4. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 780 (D.C. Cir. 1984).

5. *See, e.g.*, I.I.T. v. Vencap, 519 F.2d 1001, 1015 (2d Cir. 1975) (international offense must be of mutual, not merely several, concern among nation states). These latter cases have, in turn, contained assurances that "the very nature of [such] executive decisions as to foreign policy is political, not judicial," Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (applying "political question" doctrine to presidential orders concerning international air routes), so that sovereigns' acts are declared unreviewable "even if the complaint alleges that . . . [an act] violates customary international law." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (applying "act of state" doctrine to expropriations by foreign sovereign).

It may be noted that in this article the terms "sovereign" and "executive" are attributed multiple meanings, in keeping with the combined domestic and international themes of the cases under consideration. In American constitutional parlance, "executive" refers to the executive branch of government deriving powers under Article II, and is counterposed here against the judicial branch. The "sovereign" in the American system, of course, is said to be the people themselves, who have in the Constitution delegated their sovereign powers to the different branches of government. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (original and supreme will of the people organizes and limits government, and assigns to different departments their respective powers); THE FEDERALIST No. 78, at 467-68 (A. Hamilton) (C. Rossiter ed. 1961) (Constitution supreme because the intention of the people must be preferred to the intention of their agents).

In the British system, and in international law generally, the sovereign is the Crown (i.e., the executive) in its capacity as head of state. *See* Attorney General for Canada v. Attorney General for Ontario ("The Labour Conventions Case"), [1937] A.C. 326 (P.C.) (ratification of treaty in British constitutional law entails executive act of Royal assent). In international discourse, however, acts of the head of state are significant beyond the mere executive capacity of such an officer, and are said to embody the acts of the entire nation. *See* Australia v. France; New Zealand v. France ("The Nuclear Test Cases"), 1974 I.C.J. 253, 457 (statements of President of the Republic as head of state are, in international relations, acts of the French state). Thus, the American notion of sovereignty flowing from the bottom up, and the British conception of sovereignty flowing from the top down, may be seen to merge.

distinct phases in the historical development of internalization doctrine. The first two decisions are "prize" cases,[6] disputes which arose when a U.S. ship captured a ship flying an enemy flag and claimed the vessel and cargo as prizes of war. Within this context, Chief Justice Marshall first asserted the judiciary's preeminence over the executive in the process of internalization.[7] In so doing, he deployed an embryonic rhetoric of individual rights, and provided a framework in which the articulation of private rights in international disputes was later to emerge.[8] The third case in the series involves judicial recognition of the acts of a *de facto* government, and embodies the crystallization of a "rights" approach to internalized claims.[9] The fourth involves an alien tort action premised on a violation of international law, and reflects in its analysis a transnational application of liberal legalism.[10] These cases document the development of an adjudicative form which assimilates some international legal claims to the positions of litigants asserting individual rights, while excluding other such claims from the domestic judicial process.

This article argues that two opposing visions of the international legal order underlie the various doctrinal distinctions and linguistic maneuvers that permeate the case law in this field. Thus, rather than attempting to find coherence in the language of the diverse opinions, this article attempts to discern the structural patterns which run through the courts' otherwise conflicting analyses. These patterns will emerge more clearly through an historical presentation, in which outmoded judicial discourse becomes particularly unpersuasive. In this way, one can see how the doctrinal changes represent shifting techniques with which to mask the conflict between two intractable visions defining legality in the transnational context. In a nutshell, these visions correspond roughly to the two sides of the debate over the nature of federalism which dominated American constitutional thinking until the Civil War: the compact theory and Chief Justice Marshall's version of popular sovereignty.

I. The Background of Eighteenth-Century Case Law

To place Chief Justice Marshall's 1815 decision in *The Nereide* in historical context, it may be helpful to summarize the English common law on internalization at the time of the American Revolution. Perhaps the most logical place to start is the frequently-cited decision of Lord Mans-

6. The Nereide, 13 U.S. (9 Cranch) 388 (1815); The Paquete Habana, 175 U.S. 677 (1900).
7. *See* The Nereide, 13 U.S. (9 Cranch) 388 (1815).
8. *See* The Paquete Habana, 175 U.S. 677 (1900).
9. M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933).
10. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

field in *Triquet v. Bath*.[11] The case involved a suit by the creditors of one Christopher Bath, who had engaged in considerable trade both as a merchant in England and Ireland and as a "commissary of stores abroad" during his employment as the Bavarian foreign minister's domestic servant.[12] Although the legal issue was framed in terms of Bath's liability for a specific set of debts, the delicate question of the Crown's relations with its foreign sovereign counterparts lingered just beneath the surface.

Lord Mansfield's opinion indicated, as a preliminary matter, that Parliament's grant of immunity from judicial process to representatives of foreign states was merely declaratory of the law of nations.[13] The implication, however, was not quite that an English court would have been prevented from enforcing an action against diplomatic personnel in the absence of the governing legislation; rather, the opinion suggested that the Act was required to facilitate the performance of the various protocol and ethical duties required for cordial relations among sovereigns. Indeed, as Lord Mansfield notes, the diplomatic immunity statute was enacted because of an incident in which the Russian ambassador to England was arrested. A copy of the Act itself, "finely illuminated by an ambassador extraordinary,"[14] was then sent in satisfaction of the King's gentlemanly duty to the Czar.

Thus, although Lord Mansfield is often credited with taking an initial step toward the internalization of transnational norms, his opinion in *Triquet* applies only partially Blackstone's statement that "the law of nations . . . is here adopted in its full extent by the common law, and is held to be a part of the law of the land."[15] That is, at this juncture in history, the positions of the judiciary and the Crown in advancing national interests in foreign affairs were conceived as aligned. For this reason, the mid-eighteenth century internalization cases fell short of articulating an international parallel to the developing domestic law concept of executive subordination to the rule of law.[16]

11. 97 Eng. Rep. 936 (K.B. 1764).

12. *Id.* at 936.

13. Act for Preserving the Privileges of Ambassadors, and other Public Ministers of Foreign Princes and States, 1708, 7 Anne, ch. 12 [hereinafter Act].

14. Triquet v. Bath, 97 Eng. Rep. at 937.

15. 4 W. BLACKSTONE, COMMENTARIES 67 (1823).

16. Although the British constitutional concept of the subordination of the Crown and its officers to the rule of law was not fully articulated until Dicey's late nineteenth century pronouncements that there could be no "exemption of officials or others from the duty of obedience to law," A. DICEY, LAW OF THE CONSTITUTION 202 (9th ed. 1945), the notion does appear in inchoate form in earlier periods. Thus, Blackstone indicated that the courts could restrain the Crown's power in cases of interference with private property even if this entailed confrontation with the personal will of the sovereign. 3 W. BLACKSTONE, COMMENTARIES

By the time of the American Revolution, the ethical duties of the sovereign in foreign affairs that had been internalized by Lord Mansfield were enforceable only insofar as such enforcement would support the executive's positions in the international arena. The question remained, however, whether the judiciary could use internalization of international norms to expand its role to encompass something other than support. Could the courts, in the guise of implementing international law, pursue a course of action with respect to foreign sovereigns that the executive would not or could not undertake? The possibility of such a development posed a problem that had not previously been considered. In its judicially-internalized form, the law of nations, as a normative structure within which the interaction among sovereigns takes place, threatened to undermine the very sovereignty upon which international legality is said to be based.

In the next stage of development of the internalization doctrine, the judiciary adopted a posture of supplementing executive inaction rather than merely complementing executive action. This transition emphasized a conceptual gap between identifying the source of international norms as lying in sovereign consent, and implementing such norms in the face of sovereign restraint. To disguise the contradiction, courts employed rhetorical techniques which avoided the intrinsic dilemma presented by the concept of sovereignty. With its implication that sovereign power is restricted only by one sovereign's willingness to accommodate other sovereign equals, sovereignty could not be reconciled with a judicial capacity to enforce international, or extra-sovereign, legal norms.

The rhetoric of honor, which permeated Lord Mansfield's characterization of inter-sovereign relations, was, by the 1780's, supplanted by expressions of convenience in the conduct of foreign affairs. This rhetoric of convenience became the primary way to describe international behavior, and was the medium by which the contradiction between absolute sovereignty and internalization was masked. For example, in *Respublica v. De Longchamps*,[17] a Pennsylvania case pre-dating the U.S. Constitution, the defendant was convicted of a crime against international custom (internalized by the court as a common law offense) for insulting and threatening bodily harm to the French consul-general. The nature of the offense and the character of the insult[18] seem to have been tailor-made for a Lord Mansfield-type analysis of the etiquette required of one sover-

254-57 (1823). For a general historical overview, see Jaffee & Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 LAW Q. REV. 345 (1956).

17. 1 Dall. 111 (Pa. 1784).

18. "*Je vous deshonnerera, policon, coquin.*" *Id.* at 111.

eign in his relationship with the representatives of another. Yet the decision centered on the inconvenience to Franco-American relations caused by the impugned act; the diplomat "must have been prevented from paying a [sic] proper attention to his appointments, which is certainly a violation of the law of nations."[19]

As a rhetorical technique, the emphasis on convenience effectively shifts attention away from the contradiction between sovereign control of foreign relations and the judiciary's expansion of its influence into this area. The antagonism between the theoretical source and the actual operation of international law is never addressed in the cases that follow. Just as *Triquet* and *De Longchamps* employed the rhetoric of honor and inconvenience to mask the underlying tension, so the following four cases use various rhetorical devices to manage this conflict. In all of these cases, then, the judicial dilemma is solved by resort to a form of argument which makes it seem to disappear.

II. The Development of Internalization Doctrine: Four Cases

A. *The Nereide*

The *Nereide* case arose in this context of rhetorical transition. Given the relatively timid positions taken in the prior case law, Chief Justice Marshall's assertion in this case of judicial authority over the actions of an American armed vessel went far beyond a mere restatement of Blackstone's earlier definition of internalization.[20] The U.S. ship had seized and claimed as a prize of war cargo, belonging to a neutral, that was found in the hold of a belligerent ship. The cargo's owner, Manuel Pinto, was a Spanish subject who had chartered the British vessel, the *Nereide*, to transport his goods from London to Buenos Aires during the height of the War of 1812. Pinto's successful argument for the return of his merchandise was twofold. He first asserted that neither he nor his property had "acquired a hostile character" by virtue of his brief domicile in England.[21] Second, Pinto insisted he was free as a neutral to place his cargo in either a belligerent or a neutral ship. His victory, as phrased by counsel, represented a recognition of and respect for "the rights of neutral commerce" under international law.[22]

Marshall's contribution was to employ the rhetoric of legal "rights" to transmute the moral duties and conveniences of a previous age into a

19. *Id.* at 114 (arguments of Attorney General).
20. *See supra* text accompanying note 15.
21. The Nereide, 13 U.S. (9 Cranch) at 392.
22. *Id.* at 392-95 (arguments of counsel for the appellant).

force capable of restricting, rather than merely facilitating, executive action. Any number of rights were said to be involved in the controversy over the *Nereide* and its cargo. According to Marshall, these rights governed the conduct of nations as a natural outgrowth of the reasoning process. The merchant's right of neutral commerce was counterposed against the belligerent's right of arrest and search, with the latter described as a mere subset of the right of capture. In addition, the right of capture was described as antagonistic to the neutral's right to choose a vessel of any flag.[23] Reason alone reconciled the conflict between these rights. Marshall asked rhetorically: "What is this right of search? Is it a substantive and independent right wantonly, and in the pride of power, to vex and harass neutral commerce, because there is a capacity to do so? or to indulge the idle and mischievous curiosity of looking into neutral trade?"[24] The Court articulated the scope of a neutral's right to choose any vessel, including that of a belligerent state, in a similar fashion. "The neutral has no control over the belligerent right to arm," reasoned Marshall; "ought he to be accountable for the exercise of it?"[25] Using a deductive style of discourse, Marshall derived the rights of the parties by noting that they flowed naturally from the relations at issue; this invocation of rationality allowed him to manage the conflict between sovereignty and internalization. As a practical result, the executive's power to act arbitrarily in foreign affairs was circumscribed by an extra-constitutional rule of reason.[26]

Although Marshall's analysis did in some way limit U.S. sovereignty, the approach was conceptually distinct from the classical liberal formulation of individual rights against the state which would later develop. Most notably, the case failed to mention, and was indeed premised on the

23. These rights traced their source to the realm of inevitable logic: the right of capture might be deduced from the very state of belligerency, the right of passage from the very state of neutrality, and so on. Marshall stated: "The rule that the goods of an enemy found in the vessel of a friend are prize of war, and that the goods of a friend found in the vessel of an enemy are to be restored, is believed to be a part of the original law of nations. . . . This rule is founded on the simple and intelligible principle that war gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend." *Id.* at 418-19. He then reiterated: "That a neutral may lawfully put his goods on board a belligerent ship for conveyance on the ocean, is universally recognized as the original law of nations. It is, as has been already stated, founded on the plain and simple principle that the property of a friend remains his property wherever it may be found." *Id.* at 425.

24. *Id.* at 427.

25. *Id.* at 426.

26. The power to conduct foreign and military affairs is said to derive from the article II, § 2 power to act as Commander-in-Chief and to make treaties and appoint ambassadors, the article II, § 3 power to receive ambassadors, and the article II, § 3 duty to "take Care that the Laws be faithfully executed." *See generally* Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 39-44 (1972).

absence of, a public/private distinction. Pinto's right to protect his private property was not a right automatically granted to an individual, but was recognizable as a claim only insofar as it could be incorporated into Spain's right of neutral commerce. This explains the extensive and, to contemporary ears, bizarre discussion of the "friend or foe" character of Pinto's goods.[27] The dispute before the Court, though arising as a claim to title in private property, was presented as an international conflict between sovereign states. The international claims, in turn, were assimilated through the rhetoric of rights and deductive reasoning to the claims of private plaintiffs.[28]

For Marshall the judiciary was not, however, the final arbiter of all international controversies involving the United States. Some questions of foreign relations followed "the devious and intricate path of politics"[29] and were thus unabsorbed by the discussion of rights.[30] The implication of Marshall's analysis was that, while the judiciary may appropriately circumscribe executive action in the name of individual rights, the other branches of government must be free to operate when national concerns are at stake. In Marshall's words, "it is not for its Courts to interfere with the proceedings of the nation and to thwart its views."[31] Thus, when a court internalizes international law, it restrains the exercise of sovereignty not only in the traditional sense of executive action, but also in the sense of popular sovereignty—the wishes of the community as a whole.

As a corollary to such judicial activism, the relegation of some types of international relations to the political sphere creates a realm in which the rule of reason does not operate, and the notion of rights is allowed to succumb to the nation's collective, and arbitrary, will. Without a public/private framework, however, the line between sovereignty and individual rights is nearly impossible to draw. Nevertheless, Marshall's opinions represent a rudimentary attempt to employ the language of rights to deemphasize the contradiction between the nation's sovereign interests and the domestic judicial enforcement of international law.

27. The Nereide, 13 U.S. (9 Cranch) at 389-412.

28. The dispute is said to be readily resolved through "the exercise of that cold investigating faculty which ought always to belong to those who sit on this bench." *Id.* at 430.

29. *Id.* at 423.

30. A prime example is the issue of retaliation against Spain for its failure to provide Americans with rights of passage similar to the right claimed by Pinto. *Id.* at 422.

31. *Id.*

B. *The Paquete Habana*

The next case represents both a significant advancement of the liberal paradigm with respect to international legal claims and a retreat from the extent of Marshall's internalization. The appellant, master of a small fishing boat operating out of Havana and flying the Spanish flag, successfully resisted the condemnation and sale of his vessel as a prize of war after it was caught in the U.S. blockade of Cuba during the Spanish-American War. The opinion begins with the premise that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[32] While this statement is hardly extraordinary—courts having articulated similar sentiments uncontroversially for at least a century—one can perceive in the facts of the case an impending judicial quandary. The *Paquete Habana* flew the flag of Spain, a nation with which the United States was at war. Unlike in *The Nereide*, the international claims made by the individuals in this case placed the judiciary in the position of potentially interfering with America's military operations against an enemy.

The Court applied three dualities in its effort to resolve the inherent conflict between the national interest and international legal rights, or between sovereignty and internalization. First and foremost was the public/private distinction, articulated in an embryonic yet unmistakable form. The Court then distinguished between internal and external sources of the appellant's rights, noting that here the President himself had internalized international legal norms. Finally, the pervasive use of positive law/natural law language ultimately swallowed up the other rhetorical devices employed. It will be helpful to examine each of these in turn.

1. The Public/Private Distinction

The Court first dissociated the appellant fisherman from the identity of his flag by asserting that the "coast-fishing industry is, in truth, wholly pacific, and of much less importance, in regard to the national wealth that it may produce, than maritime commerce or the great fisheries."[33] The Court further acknowledged that the appellant, like "peasants and husbandmen," belonged to "a class of men whose . . . labor . . . is . . .

32. The Paquete Habana, 175 U.S. at 700.

33. *Id.* at 702 (quoting 2 ORTOLAN, RÈGLES INTERNATIONALES ET DIPLOMATIE DE LA MER 51 (1864)).

foreign to the operations of war."[34] After separating the claims of Spanish fishermen from Spain's military activity, the Court could then conclude that the international law "exemption of coast fishing vessels from capture is perfectly justiciable."[35] The liberal division between public and private spheres was not clearly articulated at this stage in international legal discourse. Therefore the Court had to distinguish the particular circumstances surrounding the coastal fishing industry in order to further dissociate the claims of fishermen from "military or naval . . . necessity to which all private interests must give way."[36] However, the rudimentary distinction between vessel and flag separated the enemy's actions from those of private citizens, creating a judicially-enforceable exemption for the latter "notwithstanding . . . the extent of the recognized rights of belligerents"[37] to exercise their sovereign powers of warfare.

The public/private distinction, even in this nascent form, recharacterized the international conflict as a struggle between state power and individual rights, to be managed by the judiciary rather than the executive. While the Court did not address the legal propriety of military activities, the internalization of the private rights of fishermen effectively circumscribed the war-making power. This seemingly simple move, therefore, had implications going far beyond its rhetorical pretense.

2. The External/Internal Source Distinction

The second rhetorical device employed by the Court was a somewhat disingenuous attempt to ground the appellant's claim on an internal violation by executive officials. By applying the external-source/internal-source distinction, the Court circumvented the internalization dilemma, thus transforming the inherent contradiction between sovereignty and enforceable international restrictions into a question of domestic wrongdoing by officials within the executive branch. According to the President, U.S. naval forces had instituted a blockade of Cuban ports "in pursuance of the laws of the United States, and the law of nations applicable to such cases."[38] The Court then asserted that, by virtue of this single presidential statement, the body of international legal norms was placed on a par with U.S. law for the purposes of the blockade.

The Court read the President's announcement to imply that any action contrary to the law of nations could be treated by the judiciary as some-

34. *Id.*
35. *Id.* at 708.
36. *Id.*
37. *Id.* at 703.
38. *Id.* at 712 (citing 30 Stat. 1769 (By the President of the United States of America: A Proclamation, No. 6, Apr. 22, 1898)).

thing akin to a federal offense.[39] The Court acknowledged that the actual executive orders entailed "specific declarations of certain rules for the conduct of the war by sea, making no mention of fishing vessels."[40] Thus it considered the President to have bound U.S. forces in their operations by the general rules of international law much as they were bound by U.S. legislation.[41] The Court's decision may be interpreted less as an attempt to recharacterize the legal issue than as an effort to alleviate judicial pressure by equating internalization with the exercise of sovereign power.

The external-source/internal-source distinction, while achieving a semblance of analytic clarity, fails to meet the challenge posed by the appellant's claim of right. That is, the President, in applying international law to foreign affairs, did not specify who was to be the interpreter and arbiter of disputes arising from international claims. The President's message could have been read as implying his acceptance of international law—providing a basis for judicially-enforceable claims against the state and restricting absolute sovereignty. Conversely, the presidential statement could have been interpreted as defining international law as a forum in which sovereignty remains intact and the executive is the ultimate interpreter and enforcer of the nation's collective interest. The Court, in assimilating the President's speech concerning the nation's external relations to domestic positive law, effectively masked the conflict between the executive and judicial branches. It is possible that the Court's own recognition of the deceptive character of this approach resulted in its limiting the external/internal line of analysis to two paragraphs within a fifteen-page opinion, making it a secondary footing on which the majority decision was based.

39. *Id.* at 716 ("This case involves the capture of enemy's property on the sea, and executive action, and if the position that the alleged rule *proprio vigore* limits the sovereign power in war be rejected, then I understand the contention to be that, by reason of the existence of the rule, the proclamation of April 26 must be read as if it contained the exemption in [its] terms . . . ."). The dissent posed the issue as one of determining whether the Secretary of the Navy acted outside the scope of his delegated authority by seizing a coastal fishing boat, thus giving rise to a species of administrative law claim.

40. *Id.* at 712. The Court cites 30 Stat. 1770 as containing the executive orders (By the President of the United States of America: A Proclamation, No. 8, Apr. 26, 1898).

41. It is relatively settled that U.S. legislation is capable of governing the actions of U.S. forces abroad, even in violation of international law. *Cf.* The Over The Top, 5 F.2d 838 (D. Conn. 1925) (court asserts power to enforce statute mandating Coast Guard operations beyond internationally-recognized territorial sea).

3. Positivism and Natural Law

Unlike in the early nineteenth century, when the judiciary restrained sovereign power in the name of reason and natural right,[42] the Court in *The Paquete Habana* deliberately classified the protection of coastal fishermen as a requirement of positive law. As is the case in most international law discourse, the Court supported this judgment by constant reference to sovereign consent.[43] Thus, although there was no treaty governing the particular incident under consideration, the Court engaged in a lengthy survey of U.S. treaties that acknowledged an exemption of coastal fishermen from capture. To support further its finding of positive law, the Court noted that all other seafaring nations consented to such a rule in their domestic law and treaty arrangements. "Like all the laws of nations," the majority reasoned, "it rests upon the common consent of civilized communities," and "is of force, not because it was prescribed by any superior power but because it has been generally accepted as a rule of conduct."[44]

The application of the international positivist theme, like reliance on an internal source of law, dissipates the conflicts created by internalization. The Court rationalized that, even if non-domestic norms were imposed to limit the exercise of sovereign power, the source of these norms is none other than the consent of the sovereign itself. This rhetorical sleight of hand, however, obscures the picture. After all, the entire body of international law is not being internalized, but only those particular rules which in certain circumstances translate into a claim of individual right. Thus, expressions of humanitarian concern, grounded in the natural rights implicit in the human condition, supersede the rhetoric of sovereign consent and transcend the need for state concurrence. In one remarkably schizophrenic sentence, the Court concluded that "by the general consent of the civilized nations of the world, . . . founded on considerations of humanity to a poor and industrious order of men, . . . coast fishing vessels . . . are exempt from capture as prize of war."[45]

42. *See, e.g.*, Gardner v. Village of Newburgh, 2 Johns. Ch. 161, 167 (N.Y. Ch. 1816), in which a New York statute which provided for the diversion of a stream, but failed to provide compensation to the property owner, was not enforced on the ground that "this great and sacred principle of private right" (i.e., compensation for a taking) could not be violated. The Nereide, 13 U.S. (9 Cranch) at 388, may to a certain extent be seen as an international law parallel to this idea.

43. *See, e.g.*, The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 at 18 (Sept. 7) ("International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims."); *see also infra* note 60.

44. The Paquete Habana, 175 U.S. at 711.

45. *Id.* at 708.

The mix of sovereign consent with undeniable humanitarian impulses makes for a curious interplay of positivism and notions of natural right. Although natural rights are never explicitly defined, the Court exempts persons pursuing the "absolutely inoffensive, and deserving"[46] and "eminently peaceful"[47] industry of coastal fishing from capture not because of any positivist agreement or acquiescence by heads of state, but because "the principles of equity and humanity"[48] demand it. As described by the Court, Spain and the United States, acting out of self-interest, may have consented on behalf of their nations to positive rules of international conduct. Yet under these particular circumstances, the general agreements are displaced by the notion that failure to honor the private exemption accorded the fishermen would be inhumane.

By introducing the public/private distinction, *The Paquete Habana* represents a first step toward the application of the liberal adjudicative paradigm[49] to customary international law. Generally, the rhetoric of broad international norms maintains the image of state sovereignty by allowing most foreign affairs decisions to remain under the control of the executive branch. Yet beyond the discretion of the sovereign lie certain humanitarian norms which the Court internalizes as natural rights and as necessary outgrowths of the human condition. This positive law/natural law dichotomy permeates the discourse and provides the conceptual framework in which the rudimentary public/private distinction can operate.

C. *Salimoff v. Standard Oil*

The distinction between judicial and executive enforcement of customary international norms, or between claims that can and cannot be internalized, received its ultimate expression in the recognition cases of the 1920's and 1930's. This line of case law culminated in 1933 with the decision of the Court of Appeals of New York in *M. Salimoff & Co. v. Standard Oil Co.*,[50] which considered the effect in the United States of a Soviet decree nationalizing all oil lands within the Soviet Union. The case was brought by former Russian landowners against the eventual purchasers of oil extracted from their lands. In *Salimoff*, the divergence of *de facto* judicial recognition from *de jure* executive recognition presented a dichotomy between those notions of right that established a

46. *Id.* at 707 (citing I. NEGRIN, ELEMENTARY TREATISE ON MARITIME INTERNATIONAL LAW (1873)).
47. *Id.* (citing P. FIORE, PUBLIC INTERNATIONAL LAW (1885)).
48. *Id.*
49. *See infra* text accompanying note 59.
50. 262 N.Y. 220, 186 N.E. 679 (1933).

boundary between the individual and state, and those notions that did not circumscribe sovereign power.

All of the recognition cases operate in a rhetorical environment in which the act of recognition establishes the sovereign character of the recognized government. U.S. courts have held repeatedly that, under international law, recognition is a crucial factor in determining the validity of a state's acts.[51] Recognition thus preserves sovereign control by requiring consent to membership in the international community, and, at the same time, limits unilateral action by restricting the exercise of sovereign self-determination. Accordingly, Judge Cardozo asserted that recognition might be denied a sovereign where the requisite, though discretionary, act of recognition by other sovereigns has not occurred: "Juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it."[52]

The distinction between *de jure* and *de facto* recognition in *Salimoff* simultaneously preserves and displaces the executive decisional process as the sole means of assessing international legal claims. The plaintiffs, Russian nationals, argued that "the confiscatory decrees of the unrecognized Soviet government and the seizure of oil lands thereunder have no other effect in law on the rights of the parties than seizure by bandits."[53] The court, however, asserted a distinction between the "refusal to recognize Russia as a country with which the United States may have diplomatic relations" and the fact that the Soviet authorities are "not unrecognizable as a real governmental power which can give title to property within its limits."[54] Thus the court, consistent with the duality in international law, required a different analysis for the determination of title to property than that which is applied generally to the acts of unrecognized governments.

The court minimized the distinction between the treatment of nations in diplomatic relations in general and in specific conflict situations involving property rights by way of a deceptively simple dichotomy, that of *de jure* and *de facto* recognition. The point of the exercise, of course, was to mask the perceived conflicts between international legal doctrines

51. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 94(1) (1965) ("By an act of recognition, a state commits itself to treat an entity as a state or to treat a regime as the government of a state.").

52. Sokoloff v. National City Bank of New York, 239 N.Y. 158, 165, 145 N.E. 917, 918 (1924).

53. M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. at 223, 186 N.E. at 680-81 (1933) (citing Luthor v. Sagor [1921] 1 K.B. 456).

54. *Id.* at 227, 186 N.E. at 682.

and property or tort law. Ironically, in accomplishing this task, the judicial and executive branches were portrayed as having reversed roles, with the former stating empirical political realities, while the latter was confined to abstract considerations of law. The court appeared to leave the weighty and purely legal decision with the executive branch, while appropriating for itself the task of authoritative recognition in the guise of merely acknowledging indisputable facts. It therefore acquired decisional power by minimizing its own role in affording *de facto* recognition to the Soviet Union. "As a juristic conception, what is Soviet Russia?"[55] the court asks in an almost sarcastic voice. "We all know that it is a government," the answer plainly asserts; "[t]he State Department knows it, the courts, the nations, and the man on the street."[56]

The assertion of judicial authority through the *de jure/de facto* distinction not only confines sovereign recognition to the sphere of international relations but also removes from the executive *de jure* decision the determination of individual rights. In a doctrinal sense, it transforms the court's analysis of the Soviet nationalization decree from a question of international law to one addressed by the rules of conflicts of law. Once the court recognizes *de facto* Soviet authority, it may hold that any recovery in conversion by the former title holders is "dependent upon the laws of Russia" as the proper "place of the wrong."[57] This jurisdictional approach to the Soviet acts avoids the need for substantive judicial consideration of the Soviet confiscatory measures and the consequent judicial evaluation of the character of a foreign sovereign. As a result, the court assumes a more classically liberal posture in drawing boundary lines between conflicting assertions of private rights.

Furthermore, by separating the issues of international recognition from both the validity of a government's domestic acts and the impact of such acts on the rights of its own constituents, the court avoids direct curtailment of U.S. sovereign power. This partial internalization (or, perhaps more accurately, this non-internalization) of the international recognition doctrine portrays as intact the executive power to grant or withhold recognition at will. The rhetoric proclaiming self-evident truths deflects attention from the indirect curtailment of external sovereignty by creating separate forms of judicial and executive recognition. Thus, restructuring the recognition question in terms of choice of law sets out the basic *de jure/de facto* distinction, which, in turn, disguises

55. *Id.* at 226, 186 N.E. at 682.

56. *Id.*

57. *Id.* (citing Riley v. Pierce Oil Corp., 245 N.Y. 152, 154, 156 N.E. 647 (1927)).

the conflict between the national interest and individual proprietary rights.

The dual recognition doctrine in *Salimoff* corresponds to the public/private and positivist/naturalist distinctions found in *The Paquete Habana*. The *Salimoff* court's differentiation between those recognition questions within the authority of the executive and those within the decisional capacity of the court parallels the distinction between public and private international law. Moreover, the court traced the *de jure* status of a foreign government to positive sovereign consent, while portraying its *de facto* status as a condition that no sovereign could fail to acknowledge. "The United States government," the court declares, "has refused diplomatic recognition as one might refuse to recognize an objectionable relative, although his actual existence could not be denied."[58] In *Salimoff*, the court views international law in two distinct ways: (1) as public, positive law in which *de jure* determinations are the prerogative of the executive; and (2) as a collection of private, natural rights whose implementation goes beyond sovereign consent and is properly a judicial matter.

The approach taken in *Salimoff*, distinguishing personal property rights from U.S. sovereignty, foreshadows the dichotomy between human rights doctrine and international law in general. With respect to the former, the rhetoric of self-evident rights allows the court to mediate the contradiction between the interests of the individual and those of the nation. Yet the language of executive control over foreign affairs and sovereign consent to international obligations dominates the rest of international law. This dichotomy reflects two distinct visions of the structure of the international legal system. The human rights vision is familiar in that it conforms to the paradigm of liberal legality in which individual rights limit state action and both parties are akin to private holders of conflicting rights. International law focusing on sovereign control, however, seems less familiar, since discussion of group rights and legal interests which subsume the individual within the collective is less prevalent in the Anglo-American legal tradition.[59]

58. *Id.* at 226, 186 N.E. at 682.

59. Self-governing American Indian tribes exemplify this latter type of legality in U.S. law. Throughout American history, Indian tribes have been said to constitute distinct political communities of a "national character," Worcester v. Georgia, 31 U.S. (6 Pet.) 536, 559 (1832), such that they not only retain inherent powers of internal self-government, but exercise those powers in a legal environment free of constitutional review by the federal judiciary. Talton v. Mayes, 163 U.S. 376, 382-83 (1896) (murder indictment in Cherokee tribal court need not conform to fifth amendment requirement of indictment by grand jury). This power of self-government continues to exist, at least insofar as the tribal powers have not been abrogated by treaty or federal legislation. Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 94 (8th Cir. 1956).

In the international context, these differing visions may be traced to two alternative theories of legality. The first is known in international law parlance as "consent" theory.[60] It finds its closest domestic parallel in the pre-Civil War notion of the constitutional compact,[61] which characterized the union as a multilateral device to which "each state acceded as a state," and in which there is "no common judge, each party having an equal right to judge [the constitutionality of another party's acts] for itself."[62] According to this model, "sovereign power is absolute," so that "the exercise of the one sovereign power cannot be controlled by the exercise of the other."[63] In the case of a conflict between sovereign interests, "mutual confidence, discretion, and forebearance can alone qualify the exercise of the conflicting powers."[64]

Imagine the sense of contradiction experienced by members of the Native American Church, whose pursuit of traditional Navajo rituals involving peyote received first amendment protection against state and federal laws, State v. Whittingham, 19 Ariz. App. 27, 29, 504 P.2d 950, 952 (Ariz. 1973), *cert. denied*, 417 U.S. 946 (1974), but whose communal religious expression received no protection against the Christian-dominated tribal council when the council banned the hallucinogenic substance on the tribe's collective behalf. Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 134-35 (10th Cir. 1959). The two forms of legal argument—individual rights against the American liberal state and communal advancement by the tribal government—embody distinct and insulated modes of discourse which, when brought together in the way demanded by the Navajo traditionalists' claim, reveal an insurmountable contradiction.

60. Discussions of the sources of international law frequently point to the consent of sovereigns. *See, e.g., supra* note 43 and accompanying text. The consent theory may be seen as a defense mechanism set up in international discourse against an Austinian positivist critique of the concept of law in the absence of an overarching sovereignty. *See* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 201 (1954) ("[L]aw obtaining between nations is law improperly so called . . . ."). Thus, in the sources of doctrine pertaining to treaties, it is generally said that "the legal basis of . . . conventions, and the essential thing that brings them into force, is the common consent of the parties." Reservations to the Genocide Convention Case, 1951 I.C.J. 32 (Guerrero, McNair, Read, and Hsu Mo, JJ., dissenting). Similarly, in the doctrinal pronouncements on the binding source of international custom, the emphasis is generally placed on an identification of a "constant and uniform usage, accepted as law," Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 277 (implying a generalized, but nevertheless consensual, basis of the legal obligation). The idea is to counterpoise sovereign consent against the otherwise natural law image of international norms which somehow transcend sovereignty.

61. It is not uncommon for courts to refer to international law rules in resolving controversies among the states in the federal system. *See, e.g.*, New Jersey v. Delaware, 291 U.S. 361 (1934) (state boundary follows navigable channels of Delaware River and Delaware Bay); Handly's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374, 374-75 (1820) (Kentucky state boundary created by Virginia land grant extends only to low water mark of Ohio river). It is less common, however, to attempt to find an explanation for international law in theories of federalism. Nevertheless, the attempt is made here.

62. Jefferson, *Kentucky Resolutions of 1798*, NORTH AMERICAN REVIEW 501 (1830), *quoted in* 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 213 n.1 (3d ed. 1858).

63. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 370-71 (1819) (arguments of counsel).

64. *Id.*

The most obvious parallel between such constitutional pronouncements and public international law is the absence under a compact theory of a judicial arbiter for international disputes.[65] Each sovereign participating in the system represents the interests of its entire constituency, allowing legal action based on unlimited sovereign power. In a vision of federalism or international legality premised on a sovereign compact, disputes are not assimilated to the paradigm of justiciable resolution which adjudicates conflicts between private rights. Rather, various co-equal sovereign communities define legality through cooperation and self-imposed forebearance from intrusive actions. Although the advent of the system of judicial review and, ultimately, the Civil War put an end to any application of the compact theory to the structure of American federalism, the rhetoric of sovereign consent and cooperation retains its dominant place within the sphere of international relations.

The second conception of international legality, suggested in *The Paquete Habana* and *Salimoff* through their depiction of state action as corresponding to contested individual rights, encompasses the human rights dimension of international law. Its closest parallel in U.S. constitutional theory may be found in John Marshall's version of popular sovereignty. In his view, the people of the United States established a constitution, not a confederation, so that "the government proceeds directly from the people."[66] The American federalist notion that sovereignty resides in the people as a whole rather than in individual states denies the states the right to withdraw from the overall federal system. Central to the internalization of international norms, however, is the implication that "[t]he Constitution gave to every person having a claim upon a State, a right to submit his case to the Court of the nation."[67] The people are envisioned as having exercised "an original right to establish . . . such principles as, in their opinion, shall most conduce to their own happiness," and, in so doing, as having "prescribed limitations" on the government's sovereign power.[68] The enforcement of these limitations is said to be "emphatically the province and duty of the judicial department."[69] At the heart of international human rights is a parallel portrayal of all of humanity, regardless of state affiliation, as comprising

65. The international system, of course, does provide mechanisms for the judicial resolution of disputes between sovereign powers in the form of the International Court of Justice and other specific tribunals. These institutions, however, are said to have no decision-making powers except those granted by explicit sovereign consent. *See, e.g.*, STATUTE OF THE INTERNATIONAL COURT OF JUSTICE arts. 35-36.

66. McCulloch v. Maryland, 17 U.S. (4 Wheat.) at 403.

67. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 383 (1821).

68. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

69. *Id.* at 177.

the ultimate source of legality and reserving for itself certain protections that restrict state action.[70]

The rhetoric of power versus right transposes state actors and their subjects from a relationship of sovereign consent and voluntary forebearance to one which circumscribes state action. Although these two alternative and contradictory modes of defining legality remain unarticulated in the case law, the shifts in judicial terminology and discursive style seen in *Salimoff* are part of an ongoing process of developing techniques to manage this deeply-ingrained conflict. The gap between an international legal regime of absolute sovereigns and one of internalized international norms which are judicially implemented against states represents the fundamental divide which the courts struggle to cross in internalization cases.

D. *Filartiga v. Pena-Irala*

Perhaps the most renowned internalization case in recent years, and certainly one of the few to deal explicitly with international human rights law, is *Filartiga v. Pena-Irala*.[71] *Filartiga* held that a U.S. federal court had jurisdiction over tort claims brought against the Inspector General of the Asunción, Paraguay police by the family of a prisoner tortured to death by the Inspector General in his headquarters. Although the defendant appears to have been deported from the United States prior to the appellate decision, the plaintiffs[72] and the defendant were all present in the United States at the time the action commenced. The court, which found federal jurisdiction on the basis of the Alien Tort Claims Act, engaged in a lengthy exploration of whether torture by a state official could be considered a "violation of the law of nations" as required by that statute.[73] Judge Kaufman explained that an examination of "the sources from which customary international law is derived—the usage of nations, judicial opinions and the works of jurists"—leads to the conclusion not only that "official torture is now prohibited by the law of nations," but that the previous belief that " 'violations of international law do not oc-

70. *See, e.g., Judgment of the Nuremberg Tribunal*, 41 AM. J. INT'L L. 172 (1947) (crimes against humanity); In re Yamashita, 327 U.S. 1 (1946) (war crimes).

71. 630 F.2d 876 (2d Cir. 1980).

72. The plaintiffs were Dolly Filartiga and Dr. Joel Filartiga, the sister and father of the actual torture victim, Joelito Filartiga. *Id.* at 878.

73. 28 U.S.C. § 1350 (1983) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

cur when the aggrieved parties are nationals of the acting state,' is clearly inconsistent with the current usage and practice of international law."[74]

This judicial implementation of human rights law provides the international cognate to Marshall's conception of popular sovereignty. Thus, although Judge Kaufman surveys the law on torture to determine the existence of a positive prohibitory norm—a "general assent of civilized nations"[75]—the norm itself suggests a natural prohibition against "any state from permitting the dastardly and totally inhuman act of torture."[76] The very manner in which the court expresses the right and defines its source suggests that such universal rights may be judicially enforced and affirms the internalization of this legal restraint on state action. The binding effect of the norm is expressed not so much as a matter of American, Paraguayan, or any other particular sovereign nation's consent,[77] but more as a function of the inevitable applicability of human rights to social situations and political arrangements. Accordingly, enforcement is portrayed not as a question of the external relations of cooperating sovereigns, but as the delineation of a boundary between sovereign power and the sovereign's own constituents.

Conclusion

In attaching the notion of rights to individuals, the *Filartiga* court exacerbated the division between the "public" international relationships among states and the "private" impact of state acts on individuals. This division, in turn, corresponds to the dichotomy between executive and judicial implementation of international law. The assimilation of certain international conflicts to the liberal adjudicative paradigm of contending individual rights, and the coinciding exclusion of other disputes as embodying conflicting national interests which are resolvable only by way of cooperative sovereign consent, is the central theme in the ongoing process of the internalization of international law. It is within the liberal paradigm that the rhetoric of individual right is used to manage the contradiction between sovereignty and internalization, allowing the judicial implementation of international norms. Thus, the indeterminacy apparent in the contemporary case law reflects the existence of two distinct visions of international law, which in turn correspond to the two domi-

74. Filartiga, 630 F.2d at 884 (quoting Dreyfus v. von Finck, 534 F.2d 24, 31 (2d Cir. 1976)).

75. *Id.* at 881 (quoting The Paquete Habana, 175 U.S. at 694).

76. *Id.* at 883 (citing *Declaration on the Protection of All Persons from Being Subjected to Torture*, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/11034 (1975)).

77. The court did note in passing, however, that both the United States and Paraguay have explicit anti-torture provisions in their respective constitutions. *Id.* at 884 nn.13-14.

nant strands of early American federalist thought. When examined in an historical perspective, the lack of internal coherence in the overall body of case law can be traced to the emergence of various rhetorical techniques which attempt to synthesize these deeply-rooted, competing visions.